

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JENNIFER H.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

CASE NO. C20-94-BAT

**ORDER REVERSING AND
REMANDING FOR FURTHER
PROCEEDINGS**

Plaintiff appeals the ALJ's decision finding her not disabled. She contends the ALJ erroneously rejected her testimony and failed to properly develop the record. Dkt. 23 at 1. The Court finds the ALJ harmfully erred and **REVERSES** the Commissioner's final decision and **REMANDS** the matter for further administrative proceedings under sentence four of 42 U.S.C. § 405(g).

A. Plaintiff's Testimony

The ALJ did not find malingering and thus was required to making specific findings stating clear and convincing reasons supported by substantial evidence to reject plaintiff's testimony. *Smolen v. Chater*, 80 F.3d 1273, 1283-84 (9th Cir. 1996). Plaintiff suffers from fibromyalgia, migraine headaches, gastrointestinal problems and chemical sensitivities. She testified these conditions limit her in different ways. Fibromyalgia causes to her hurt all over,

1 fatigues her, affects her ability to concentrate and recall things and exacerbates her depression.
2 She has migraine headaches 4 to 5 times a week, causing her to lie down for about 4 hours due to
3 nausea and light and noise sensitivity. Her gastrointestinal problems cause nausea, vomiting and
4 stomach pain. Her chemical sensitivity causes dizziness and rashes and problems with cleaning
5 products, hair care items, some foods, car exhaust and smoke.

6 The ALJ rejected plaintiff's testimony noting the medical record shows objective
7 findings and some treatment but does not support plaintiff's testimony about the severity of her
8 limitations. Tr. 84. Plaintiff argues the lack of "objective" evidence alone is not a valid ground to
9 reject her testimony. Dkt. 23 6-7.

10 Plaintiff is correct the ALJ may not reject plaintiff's testimony solely for lack of
11 supporting objective medical evidence. *Burch v. Barnhart*, 400 F.3d 676, 681 (9th Cir. 2005).
12 But that is not what the ALJ did. Rather, the ALJ noted there were "objective findings" but
13 plaintiff's treatment notes indicated plaintiff was "in no distress"; plaintiff had unremarkable
14 physical examinations; plaintiff received "conservative treatment" or infrequent treatment; tests
15 showed "diffuse colitis with descending colon" but no perforation, abscess or abnormality of the
16 appendix; and plaintiff worked while she had gastrointestinal problems and there is no evidence
17 of worsening since the alleged onset date there is no evidence of worsening. *Id.*

18 The ALJ thus found plaintiff's symptom testimony was inconsistent with the opinions
19 and records of her medical providers. This is a valid reason to reject plaintiff's testimony if
20 supported by substantial evidence. *See Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996)
21 (ALJ may reject claimant's testimony as inconsistent with the testimony from physicians).

22 Plaintiff contends substantial evidence does not support the ALJ's findings. The ALJ
23 found plaintiff's records showed she was in no acute distress and displayed generally alert

1 mental status. *See* Tr. 84. The finding implies the record shows plaintiff is generally well. But the
2 record, including the lengthy list of record citations provided by the Commissioner paints a
3 different picture. *See* Tr. 569 (acute intractable headache; positive for dizziness, light-headedness
4 and headaches); Tr. 576 (depression symptoms, loss of interest and pleasure, sadness, anxiety)
5 Tr. 586 (abdominal pain); Tr. 589 (non-focal, alert and oriented); Tr. 593 (has headaches all the
6 time, feels depressed and bad, sleep is poor); Tr. 595 (has obvious psychomotor retardation and
7 flat affect); Tr. 597 (has chronic body pain); Tr. 599 (chronic pain syndrome); Tr. 612 (has other
8 chronic pain, pain in both knees); Tr. 632 (patient has been nauseated for months and woke up
9 this morning vomiting); Tr. 654 (plaintiff's mother called saying plaintiff not doing well, dizzy,
10 intense muscle aches and nausea); Tr. 670 (no acute distress); Tr. 680 (negative for depression,
11 anxiety); Tr. 682 (not in distress); Tr. 690 (presented with significant abdominal discomfort); Tr.
12 693 (non-focal, alert); Tr. 697 (no acute distress); and Tr. 702 (not in acute distress). The ALJ's
13 finding that the record showed plaintiff was not in acute distress regarding her complaints of
14 pain, nausea, headaches, is thus not supported by substantial evidence and not grounds to reject
15 her testimony.

16 Regarding plaintiff's mental health symptoms, the ALJ discounted plaintiff's testimony
17 about symptoms caused by depression and anxiety. The ALJ determined plaintiff's symptoms
18 were related to situational stressor including relationship difficulties and financial problems. Tr.
19 84. The Commissioner defends this determination citing to *Chesler v. Colvin*, 649 Fed. Appx.
20 631, 632 (9th Cir. 2016). Substantial evidence does not support a finding that plaintiff's mental
21 problems are, as the *Chesler* Court found, situational in the sense they are "unlikely to persist."
22 There is no evidence plaintiff's mental problems will not persist. Rather the ALJ found that these
23 problems are severe impairments, and are documented in the medical record.

1 What the record shows, and what the ALJ appears to have intended, is plaintiff's mental
2 health symptoms worsened due to situational stressors. Except for this type of worsening, the
3 ALJ found plaintiff's ability to perform activities of daily living, her intact but limited cognitive
4 testing, and the opinions of the reviewing doctors showed she retained the ability to perform
5 gainful work activity despite persistent mental health problems. In reaching this conclusion, the
6 ALJ gave significant weight to the opinions of the reviewing doctors who found plaintiff could
7 perform simple repetitive tasks, would have occasional problems maintaining pace without a
8 routine, and that she was limited to superficial contact with others. Tr. 86.

9 Plaintiff has not shown the reviewing doctors' opinions are incorrect or the ALJ erred by
10 relying on the opinions in discounting her testimony. In short the ALJ found plaintiff's mental
11 health symptoms limited her but not to the extent plaintiff claimed. Based upon the medical
12 records and the opinions of the reviewing doctors, the ALJ arrived at a RFC determination
13 reflecting the reviewing doctors' opinions and finding plaintiff could perform simple repetitive
14 tasks, could have only superficial interaction with others, would be off-task but for less than 10%
15 of the time, and needed a work environment that was routine and predictable. Tr. 82.

16 The ALJ also discounted plaintiff's testimony on the grounds she received conservative
17 or infrequent treatment. Substantial evidence does not support the finding. As plaintiff points out,
18 the record shows plaintiff repeatedly sought medical treatment, some medical referrals did not
19 work out through no fault of her own, and that fibromyalgia, migraine headaches and colitis are
20 chronic conditions that once diagnosed do not necessarily call for frequent treatment. There is
21 nothing in the record that supports a finding that plaintiff's treatment was conservative, i.e. that
22 the quality of treatment she received is not commensurate or inconsistency with her symptom
23 testimony. complaints. Plaintiff also argues, and the record indicates, at times she was barred

1 from additional medical treatments because her insurance would not cover the tests or treatments
2 recommended.

3 The ALJ also rejected plaintiff's testimony about colitis symptoms finding plaintiff has
4 "diffuse colitis with descending colon," but no perforation, abscess or abnormality of the
5 appendix; and plaintiff worked while she had gastrointestinal problems and there is no evidence
6 of worsening since the alleged onset date there is no evidence of worsening. The ALJ provided
7 no explanation why plaintiff's "diffuse colitis with descending colon," could not cause her
8 symptoms. Rather the ALJ found her impairments "could reasonably be expected to cause some
9 of her alleged symptoms." Tr. 84. The finding is thus unsupported and erroneous.

10 Plaintiff's ability to work for most of her adult life with gastrointestinal problems alone is
11 insufficient grounds to reject her testimony. The existence of a condition before the alleged onset
12 date does not automatically mean the condition became disabling following the onset date. The
13 parties spar over whether plaintiff's condition has worsened after the onset date. But even
14 assuming plaintiff's arguments are reasonable, the Court cannot say the ALJ's determination is
15 unreasonable. In such a situation the Court is required to uphold the ALJ's determination.
16 *Tommasetti v. Astrue*, 533 F.3d 1035, 1038 (9th Cir.2008) (When the evidence is susceptible to
17 more than one rational interpretation, the Court must uphold the ALJ's findings if they are
18 supported by inferences reasonably drawn from the record.).

19 In sum, the court affirms the ALJ's findings regarding plaintiff's testimony regarding her
20 mental health symptoms and her gastrointestinal symptoms and reverses the findings regarding
21 plaintiff's migraine pain and fibromyalgia pain symptoms.

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1 **B. Development of the Record**

2 Plaintiff contends the ALJ should have recontacted examining doctor Rejoice Opara,
3 M.D. rather than rejecting her opinion as vague. Dkt. 23 at 12. The ALJ has an independent
4 duty to fully and fairly develop the record. *Tonapetyan v. Halter*, 242 F.3d 1144, 1150
5 (9th Cir. 2001). The ALJ's duty to develop the record is triggered if there is ambiguous
6 evidence or if the record is inadequate to allow for proper evaluation of the evidence. *Mayes v.*
7 *Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001); *Tonapetyan, supra*, 242 F.3d at 1150.

8 Dr. Opara opined plaintiff's ability to maintain attendance, complete a normal workday,
9 interact with coworkers, superiors and the public, and adapt to stresses encountered in the
10 workplace is **limited**. Tr. 629. The ALJ stated "[t]he undersigned finds Dr. Opara's opinion
11 somewhat vague – with areas of functioning described as 'limited' but without the degree of
12 limitations specified or described – and therefore entitled to little weight." Tr. 85.

13 The Commissioner argues the ALJ had no duty to recontact Dr. Opara because the doctor
14 failed to provide a useful statement on the degree of limitations. Dkt. 25 at 14. The argument
15 fails. There is no question Dr. Opara opined plaintiff was "limited." The opinion sets forth a
16 functional limitation and the ALJ was thus required to consider it, not merely reject it. Because
17 Dr. Opara set forth a functional limitation, it was critical for the ALJ to obtain clarification in
18 order to properly evaluate whether plaintiff can or cannot work based upon the fact she is
19 "limited." The ALJ failed to do and accordingly harmfully erred in simply rejecting Dr. Opara's
20 opinions as vague.

21 The Commissioner also argues the ALJ had no duty to recontact Dr. Opara because the
22 opinion was "a discretionary effort to develop plaintiff's record." This unsupported claim flies in
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1 the face of the ALJ's duty to consider all relevant evidence, which includes the opinion of an
2 examining doctor who set forth a functional limitation.

3 The Commissioner defends the ALJ raising several arguments not relied upon by the
4 ALJ. *See* Dkt. 25 at 14. The Court rejects these arguments because it reviews the ALJ's decision
5 "based on the reasoning and findings offered by the ALJ—not post hoc rationalizations that
6 attempt to intuit what the adjudicator may have been thinking." *Bray v. Comm'r of SSA*, 554
7 F.3d 1219, 1225 (9th Cir. 1995).

8 For the foregoing reasons, the Commissioner's decision is **REVERSED**, and this case is
9 **REMANDED** for further administrative proceedings under sentence four of 42 U.S.C. § 405(g).
10 On remand, the ALJ shall reassess plaintiff's testimony regarding her migraine pain and
11 fibromyalgia pain/fatigue symptoms, recontact Dr. Opara to clarify the extent of plaintiff's
12 limitations, develop the record and redetermine plaintiff's RFC as needed, and proceed to the
13 remaining steps as appropriate.

14 DATED this 7th day of December, 2020.

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17 BRIAN A. TSUCHIDA
United States Magistrate Judge
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